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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. EDWIN NORBERTO RODRIGUEZ, Defendant and Appellant.	A147168 (San Mateo County Super. Ct. No. SC083735A)

Edwin Rodriguez was convicted by jury of assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(4))[1] and battery with serious bodily injury (§ 243, subd. (d)). An allegation that Rodriguez inflicted great bodily injury on the victim (§ 12022.7, subd. (a)) was found to be true. The court sustained sentence enhancement allegations for three prior prison terms under section 667.5, subdivision (b) (hereafter section 667.5(b) priors). Rodriguez was sentenced to a total of eight years in state prison.

Assigned counsel submitted a *Wende*[2] brief, certifying he was unable to identify any issues for appellate review. Counsel also submitted a declaration confirming that Rodriguez was advised of his right to personally file a supplemental brief raising any points which he wishes to call to the court's attention. No such supplemental brief has been submitted. As required, we have independently reviewed the record. (*People v.*

[1] Undesignated statutory references are to the Penal Code.

[2] *People v. Wende* (1979) 25 Cal.3d 436.

Kelly (2006) 40 Cal.4th 106, 109–110.) We find no arguable issues as to Rodriguez's guilt, but we find sentencing error and remand for correction.[3]

I. BACKGROUND AND PROCEDURAL HISTORY

Rodriguez was charged by felony information with assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4); Count 1) and battery with serious bodily injury (§ 243, subd. (d); Count 2). It was alleged that he personally inflicted great bodily injury in the commission of Count 1 (§ 12022.7, subd. (a)) and that both counts were violent felonies within the meaning of section 667.5, subdivision (c)(8). Four section 667.5(b) priors were pled.

Trial Evidence

German Moz was a neighbor and acquaintance of Rodriguez. In the early evening hours of June 23, 2015, Moz was en route to a corner store to buy something to drink and saw Rodriguez sitting on the steps of his house. The men exchanged greetings and talked about music Rodriguez was listening to. Moz asked Rodriguez if he had any marijuana they could smoke, and Rodriguez produced some from his backpack.[4] The pair went up the stairs to Rodriguez's front door because it was too windy at the bottom of the steps to roll a marijuana cigarette. While the two men stood at the top of Rodriguez's stairs, Moz told Rodriguez that his music was crazy ("loca"), which he meant as a compliment. Rodriguez, however, responded by punching Moz in the face with a closed fist. The force of the blow knocked Moz off the top step, sending him rolling backwards to the sidewalk at the bottom of the stairs. Moz's nose was swollen and bleeding profusely. Rodriguez ran down the stairs and demanded to know why Moz had called him loco. Moz explained that he was referring to the music. Rodriguez then rolled a marijuana cigarette, lit it, and passed it to Moz. Moz briefly tried the marijuana, then went home

[3] By order of September 13, 2016, we requested additional briefing from both parties regarding sentencing issues discussed *post*.

[4] Moz was appointed counsel and testified with a grant of use immunity regarding "use, possession or ingestion of marijuana occurring on June 23, 2015 . . . ." He testified with the assistance of a Spanish language interpreter.

and went to sleep. Later that evening, a friend of Moz's came to his house, saw that Moz's nose was broken and called 911. Police arrived, and Moz was transported to the emergency room at Seaton Medical Center. Attending physician, Dr. Tin Do, said Moz's nose was obviously broken and CT scans of Moz's head and face were ordered. Radiologist Stephen Abedon diagnosed Moz's injuries as fractures of the nasal and orbital bones, which were consistent with an impact to the face.

The defense was that Moz fell down the stairs as a result of intoxication—not a punch by Rodriguez. A recording of Rodriguez's police interrogation was played for the jury, in which Rodriguez claimed that Moz was "hella drunk" and "[t]his motherfucker fell down the stairs"; he also told officers they should "check the fuckin' blood. There's meth and probably weed in there."[5] Rodriguez's sister testified as a defense witness, saying she came home from work and saw Rodriguez and Moz sitting on the front steps. Rodriguez came in the house, and she later saw him standing at the open front door. Moz was accusing Rodriguez of being crazy and saying that he wanted to use their bathroom. She then saw Moz fall down the stairs, and that he either tripped on a potted plant or slipped in standing water.

In the prosecution's case-in-chief, evidence was presented of an assault committed by Rodriguez on another man in 2009. The responding officer in that case found the victim with a three- to four-inch laceration above his left eye, and Rodriguez had a swollen right hand. When questioned, Rodriguez said: "That guy just fell" and "That dude just fell. Fuck that dude." The prosecution and defense stipulated that in connection with the 2009 incident, Rodriguez pled no contest and was convicted of assault with force likely to cause great bodily injury.[6] The jury was instructed that they

[5] Moz denied having had anything to drink at the time of the assault. Dr. Do testified that Moz did not appear intoxicated or inebriated when he was examined in the emergency room and no obvious odor of alcohol was noted.

[6] The prosecution moved in limine for admission of two incidents of assaultive conduct by Rodriguez. The court admitted evidence of the 2009 assault after it was "sanitized" to delete reference to the fact it occurred in a jail holding cell. The court found the 2009 incident "very, very similar" and "very probative." In the second

could consider the 2009 incident, if proven by a preponderance of the evidence, in determining whether Rodriguez's alleged actions in the present case were the result of mistake or accident.

Verdict and Sentence

The jury found Rodriguez guilty of both counts and found true the great bodily injury enhancement alleged on Count 1. In a court trial on the section 667.5(b) priors, the prosecution dismissed one and the court found the remaining three to be true. Rodriguez was sentenced to the upper term of four years on Count 1, plus three years for the section 12022.7, subdivision (a) enhancement, and one additional consecutive year for one section 667.5(b) prior. The court stayed sentence on the other two section 667.5(b) priors, and found sentencing on Count 2 was precluded under section 654. Rodriguez was ordered to pay a $300 restitution fine, a $300 parole revocation fine, a $40 court operations assessment, and a $30 criminal conviction assessment. He was given credit for 150 actual days in custody and 22 days of good time credit, for a total credit of 172 days. Rodriguez filed a timely notice of appeal.

II. DISCUSSION

We find no arguable issues as to Rodriguez's conviction. Substantial evidence supports the jury verdicts on the substantive offenses and sentencing enhancements.

We also find no arguable error in the admission of evidence of Rodriguez's 2009 assault. Admission of evidence of a person's character, including evidence of character in the form of specific instances of uncharged misconduct, is prohibited to prove that person's conduct on a specified occasion. (Evid. Code, § 1101, subd. (a).) "[H]owever, . . . this rule does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393.) Evidence Code

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incident, Rodriguez was convicted of a misdemeanor violation of section 245, subdivision (a)(1), after breaking the victim's hand with a baseball bat. The court excluded evidence of that incident, finding the involvement of a weapon unduly prejudicial.

section 1101, subdivision (b) permits admission of "evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act." "We review the trial court's determination for abuse of discretion, and view the evidence in the light most favorable to the trial court's ruling." (*People v. Edwards* (2013) 57 Cal.4th 658, 711.) "Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) We do not disturb the lower court's exercise of discretion under Evidence Code section 352 unless that discretion was exercised in " ' "an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." ' " (*People v. Jones* (1998) 17 Cal.4th 279, 304.)

We also find no arguable error with elements of the sentence actually imposed. Rodriguez was ineligible for probation (§ 1203, subds. (e)(4), (k)), and the choice of an appropriate term rested within the trial court's sound discretion (§ 1170, subd. (b); see Cal. Rules of Court, rule 4.420). No abuse of the trial court's "broad discretion" in sentencing is shown. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) Additionally, no arguable issues are presented as to the fines and penalties imposed, nor as to the custody credits Rodriguez received.

We do, however, find structural sentencing error in two respects.[7] First, while the court correctly concluded section 654 precluded multiple punishment for Count 2, it improperly applied the statute when it imposed no sentence at all on that count. "Broadly speaking, one branch of section 654 precludes multiple punishment when a criminal act

[7] We note that neither the People nor defense counsel provided any assistance to the trial judge on these issues, and the sentencing approach taken by the court was consistent with that requested and recommended by the People in their sentencing memorandum.

or omission violates multiple penal provisions.[8] . . . [W]hen a trial court determines that section 654 applies to a particular count, [it] must impose sentence on that count and then stay execution of that sentence. There is no authority for a court to refrain from imposing sentence on all counts, except where probation is granted." (*People v. Alford* (2010) 180 Cal.App.4th 1463, 1466.)[9] " 'It is well settled . . . that the court acts "in excess of its jurisdiction" and imposes an "unauthorized" sentence when it erroneously stays or fails to stay execution of a sentence under section 654 . . . .' " (*People v. Le* (2006) 136 Cal.App.4th 925, 931.)

Second, the court further erred in failing to either impose additional one-year consecutive terms for each section 667.5(b) prior found to be true, or to strike those priors pursuant to section 1385, subdivision (a). Of the three section 667.5(b) priors found true, the court imposed a consecutive one-year term for only one, and stayed sentence on two. Sentence enhancement under section 667.5 is mandatory unless the prior is stricken. (*People v. Langston* (2004) 33 Cal.4th 1237, 1241; *People v. Garcia* (2008) 167 Cal.App.4th 1550, 1561.) "[T]he failure to either impose or strike a section 667.5 prior prison term enhancement pursuant to section 1385, subdivision (a) is a

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[8] Section 654, subdivision (a) provides that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. . . ."

[9] "A sentence must be imposed on each count, otherwise if the nonstayed sentence is vacated, either on appeal or in a collateral attack on the judgment, no valid sentence will remain. A seminal case—*People v. Niles* (1964) 227 Cal.App.2d 749—found a procedural solution: A trial court can impose sentence on all counts, and then stay execution of sentence as necessary to comply with section 654, that way, if the unstayed sentence is reversed, a valid sentence remains extant. [Citations.] [¶] Thus—under what Witkin coined the '*Niles* formula'—to implement section 654, the trial court must impose sentence on all counts, but stay execution of sentence as necessary to prevent multiple punishment." (*Alford, supra,* 180 Cal.App.4th at p. 1469, citing Cal. Criminal Law Procedure and Practice (Cont.Ed.Bar 2009) Felony Sentencing, § 37.50, p. 1162; Couzens & Bigelow, Basic Elements of Felony Sentencing (2009) Basic State Prison Sentence (Multiple Counts) p. 74.)

jurisdictional error which may be corrected for the first time on appeal." (*Garcia*, at p. 1562.)

Both the People and Rodriguez, in the additional briefing we requested, concede these errors. The People propose remand for correction. Rodriguez's appellate counsel, however, represents that the trial court "corrected" the section 667.5 sentencing error by striking the two priors for which sentencing was previously stayed.[10] He also contends no remand is required to correct the lack of sentencing on Count 2, since we can correct that error by ordering and staying sentence on that count. (See *People v. Alford*, *supra*, 180 Cal.App.4th at p. 1473.) The trial court, again with the assistance of counsel, has only succeeded in compounding the error.

"Subject to limited exceptions, well-established law provides that the trial court is divested of jurisdiction once execution of a sentence has begun. [Citation.] And, '[t]he filing of a valid notice of appeal vests jurisdiction of the cause in the appellate court until determination of the appeal and issuance of the remittitur.' [Citations.] This rule protects the appellate court's jurisdiction by protecting the status quo so that an appeal is not rendered futile by alteration. [Citations.] As a result of this rule, the trial court lacks jurisdiction to make any order affecting a judgment, and any action taken by the trial court while the appeal is pending is null and void." (*People v. Scarbrough* (2015) 240 Cal.App.4th 916, 923.) There are limited exceptions to this jurisdictional divestment. For instance, the trial court may, while an appeal is pending, vacate a void judgment, correct an unauthorized sentence, or correct clerical errors in the judgment. (*People v. Nelms* (2008) 165 Cal.App.4th 1465, 1472.)

After Rodriguez filed his notice of appeal on December 31, 2015, the trial court had jurisdiction to correct its unauthorized failure to impose sentence on the section

[10] Prior to our supplemental briefing order, Rodriguez's appellate counsel notified the trial court of the section 667.5 sentencing error by way of a letter dated August 15, 2016. In his supplemental briefing letter filed on September 28, Rodriguez's counsel attached copies of amended minutes and an amended abstract of judgment with a file date of August 31. On our own motion, we take judicial notice of these trial court records. (Evid. Code, § 452, subd. (d).)

667.5(b) priors and could have done so by actually imposing the sentence on each. (*People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1424 [when a shorter term of imprisonment than required by law is imposed, "the sentence is legally unauthorized and may be increased even after execution of the sentence has begun"].) The court, however, attempted to do more by *striking* the two priors, which would result in amendment of the *judgment*. "Because an appeal divests the trial court of subject matter jurisdiction, the court lacks jurisdiction to vacate the judgment or make any order affecting it. [Citations.] Thus, action by the trial court while an appeal is pending is null and void. [Citations.] Indeed, '[s]o complete is this loss of jurisdiction effected by the appeal that even the consent of the parties has been held ineffective to reinvest the trial court with jurisdiction over the subject matter of the appeal and that an order based upon such consent would be a nullity.' " (*People v. Alanis* (2008) 158 Cal.App.4th 1467, 1472–1473; see *People v. Nelms, supra*, 165 Cal.App.4th at p. 1473 [no jurisdiction to dismiss count once defendant filed notice of appeal; resentencing premised on dismissal "of no force and effect"].) The trial court had no jurisdiction to modify the judgment during pendency of this appeal, and its August 2016 actions are void. We therefore remand so that, after our decision becomes final, the court may properly act within its jurisdiction and impose a legal sentence.

III. DISPOSITION

The judgment of conviction is affirmed. The matter is remanded to the trial court for resentencing. The court is directed to impose, and to stay pursuant to section 654, a sentence on Rodriguez's conviction for battery with serious bodily injury (§ 243, subd. (d)). The court is further directed to either impose, or to strike pursuant to section 1385, subdivision (a), a consecutive sentence on each section 667.5(b) prior the court found true.

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BRUINIERS, J.

WE CONCUR:

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SIMONS, Acting P. J.

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NEEDHAM, J.